IN THE UNITED STATES DISTRICT COURT
OF THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Bankruptcy Court
Southern District of Texas
FILED
AUG 1 - 2006
Michael N. Milby, Clerk

AVA SLAUGHTER,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Cause No. H-05-3455**
	§	
JONES DAY,	§	
	§	
Defendant.	§	**A jury is requested**

PLAINTIFF SLAUGHTER'S REPLY TO DEFENDANT JONES DAY'S OPPOSITION TO MOTION TO FILE AMENDED COMPLAINT

Ava Slaughter, Plaintiff, replies to Jones Day's opposition.

Jones Day retaliated by disciplining an employee and threatening future termination. The plaintiff's actions were not criminal. She did not access private passwords. She copied a document which was left behind by an employee. She did not wiretap. She taped a conversation where the in-house investigator was giving her the firm's decision on her in-house complaint of discrimination. Jones Day retaliated on **June 20, 2006.** Amendments were due March 3, 2006. Jones Day's retaliation is the conduct in question. Jones Day waited at least 4 months to retaliate. The amendment is proper and should be permitted.

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1.

Threatening Termination for Compliance with Discovery is Retaliation

Jones Day's opposition attempts to distract the Court from the real question: Can a plaintiff subjected to retaliation in the middle of litigation seek an amendment to her complaint?

Pursuant to the rules, the answer to that question is "yes." Rule 15, Fed. R. Civ. P.

In this case, Jones Day waited until well after the deadline for amendments to take action to intimidate and discourage the plaintiff from participation and cooperation with discovery. Jones Day knew for months that the plaintiff had taped a conversation, as the tape and transcript were made available and provided by counsel. Further, Jones Day knew that plaintiff had provided documents in response to discovery, again because they were provided months ago by counsel.

After the plaintiff's deposition, which lasted for the full 8 hours permitted by the rule and stretched over two days, Jones Day disciplined the plaintiff and threatened termination. Jones Day has provided no real explanation for any reason for its delay. See, Pl. Ex. 1, Interrogatory Response to Interrogatory No. 4.

No other individual in the history of Jones Day's employment has been disciplined following the filing of a lawsuit. Pl. Ex. 1, Response to Interrogatory No. 2.

2.

The Amendment is Not Untimely and Jones Day Manufactured Any Prejudice

The discipline occurred on June 20, 2006. The motion for leave was filed on July 24, 2006. Discovery does not close for months. Jones Day retaliated following its 8 hour deposition of the plaintiff.

The amendment was filed timely and properly following the receipt of notice of the retaliatory action. Plaintiff's counsel prepared the motion and amended complaint and provided Jones Day's counsel with the opportunity to discuss. There is no evidence at all of "undue" delay. Thirty-four days is not an "undue" delay.

Jones Day argues that it "will be unfairly prejudiced because it has not had a fair opportunity to prepare its defense to Plaintiff's retaliation claim." Def. Opp. At 4. There is no evidence of unfair prejudice. Jones Day chose to retaliate against this employee. The plaintiff did not force Jones Day to violate the law. Jones Day has more than sufficient time remaining to conduct discovery and prepare its defenses.

The assertion that the fact that Kevin Richardson's deposition has been taken is as red as a herring can get. Mr. Richardson did not file or prepare the memo. See, Pl. Ex. 1 to Motion. Mr. Richardson testified that he was not involved in the retaliatory action. See, Pl. Ex. 2, Deposition of Mr. Richardson at pp. 233-234, ("Q: Have you been involved in supervising Ms. Slaughter since the day that Ms. DelRiesgo was hired? A: No, I have not.").

Jones Day's assertion that it is prejudiced because a non-involved witness has already been deposed is irrelevant at best and disingenuous at worst.

Finally, Jones v. Robinson Prop. Group, L.P., 427 F.3d 987 (5th Cir. 2005), is inapposite. The Fifth Circuit found that the plaintiff knew of the retaliation at the time of the filing of the charge of discrimination, 8 years prior to the motion. The plaintiff argued that retaliation was not clear until the deposition of the manager.

In this case, the actual retaliation: the disciplinary memo and the inherent threat of termination did not occur until June 20, 2006. Within 34 days, plaintiff sought leave to amend. This is not 8 years. Nor is it even the 4 months Jones Day waited to impose discipline in the midst of litigation. These series of events do not support a finding that the motion was untimely or will unduly prejudice defendant. Jones does not support Jones Day's opposition.

3.

Retaliation Withstands Motion to Dismiss

Jones Day misapprehends Burlington Northern and Santa Fe Railway Co. v. White, No. 05-269, 548 U.S. ____, 126 S.C. 2405 (2006). Ms. Slaughter has been disciplined and threatened with further disciplinary action, up to and including termination for responding to discovery in a civil rights case and for attempting to protect her rights.

This is a threat which has been carried out and which hangs over her head simply because she has taken actions in support of a complaint of discrimination. No other employee has been similarly disciplined. See, Pl. Ex. 1, Response to Interrogatory 2.

Jones Day has sent a message to Ms. Slaughter and to any other employee involved in litigation against the firm. The message, loud and clear, is that any attempt to preserve evidence and/or provide that evidence to appropriate authorities, including governmental investigators, will result in disciplinary action, up to and including termination. This is exactly the type of chilling environment that the United States Supreme Court envisioned when writing Burlington Northern. Retaliation is a viable cause of action.

4.

Jones Day Delay is Manufactured

Jones Day was aware of both the tape and the documents as early as February 6, 2006, the date that plaintiff responded to initial disclosures. The document in question and the tape recording and transcript were provided and made available to Jones Day at that time. Since no retaliatory action had been taken, it was inappropriate for plaintiff to file a cause of action at that time or to even provide the suggestion to the EEOC.

Jones Day waited until June 20, 2006 to take retaliatory action against Ms. Slaughter. Then, in response to interrogatories, Jones Day attempts to stretch the time closer to the June 20th date. See, Ex. 1, Response to Interrogatory No. 3. (Jones Day suggests it initially found out when reviewing responses to interrogatories and requests for production, sent in April 2006). This suggests that Jones Day is not entirely accurate when it states "After learning that Plaintiff, a current employee, violated at least two Firm Policies, Jones Day counseled Plaintiff by issuing her a written warning." Def. Opp. At 7. Actually, that sentence should be modified to include: Jones Day waited over 4 months to discipline the plaintiff after "learning" of the alleged violations. Further, the retaliation occurred a week after the second session of plaintiff's deposition. (First session, May 31, Second session, June 14, 2006).

Jones Day's conduct in this case fits within the definition of retaliation set forth by the Supreme Court. It is an action taken which will intimidate and interfere with the prosecution of claims of discrimination.

5.

Plaintiff's Preservation of Evidence and Compliance with Discovery Is Not Misconduct

Plaintiff acted in a manner which preserved evidence which would not have been provided otherwise. In taking these actions, plaintiff was acting in a manner which she thought was consistent with supporting the laws. Plaintiff did not steal documents or use passwords to access private computers or matters. Plaintiff tape recorded a conversation where the human resources manager was giving her the decision of the firm regarding her internal complaint of discrimination. Jones Day suggests that plaintiff's motives are dishonest and abusive.

Jones Day was not forced to discipline the plaintiff and threaten termination. Jones Day's interpretation of its rules are its own. The impact of that interpretation and the actions taken are properly the subject of a cause of action for retaliation.

Nothing plaintiff did deserves the treatment she received. The amendment should be permitted.

Conclusion and Prayer

Jones Day has violated the law. It has committed retaliation in the middle of litigation. The actions are properly brought before this Court. The motion to amend is timely and will not unduly prejudice Jones Day. Plaintiff respectfully prays that the Court grant the motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of this document was served, by United States Mail, postage prepaid, properly addressed, on this 1st day of August, 2006, as follows:

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